(1) 88-1223

No. - .

Supreme Court, U.S.
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In the

Supreme Court of the United States.

OCTOBER TERM, 1988.

THE COMMONWEALTH OF MASSACHUSETTS,
ET AL., PETITIONERS,

v.

UNITED STATES DEPARTMENT
OF DEFENSE, ET AL.,
RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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QUESTION PRESENTED

May Congress authorize the federal executive branch to call the militia into active duty for the express purpose of peacetime training under federal authority, over a state's objection, where the United States Constitution expressly "reserv[es] to the States respectively . . . the Authority of Training the Militia. . . ." U.S. Const. art. I, § 8, cl. 16.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, The Governor of the Commonwealth of Massachusetts, Michael S. Dukakis, is a petitioner. The following are additional respondents:

United States Department of the Air Force;
United States Department of the Army;
National Guard Bureau;
Frank C. Carlucci, Secretary of Defense;
John O. Marsh, Jr., Secretary of the Army;
Edward C. Aldridge, Secretary of the Air Force;
Lieutenant General Herbert M. Temple, Jr., Chief of the National Guard Bureau.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

THE COMMONWEALTH OF MASSACHUSETTS,
ET AL.,

Petitioners,

V.

UNITED STATES DEPARTMENT
OF DEFENSE, ET AL.,

Respondents.

PETITION FOR A WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The Commonwealth of Massachusetts and its Governor, Michael S. Dukakis, respectfully petition for a writ of certiorari to review the judgment

of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a-5a) is reported at 859 F.2d 1066 (1st Cir. 1988). The opinion of the United States District Court for the District of Massachusetts (App. 6a-43a) is reported at 686 F.Supp. 30 (D. Mass. 1988).

JURISDICTION

The judgment of the Court of Appeals was entered on October 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 8, cls. 15 and 16 provide:

> The Congress shall have power . . .
>
> [15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> [16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; . . .

U.S. Const. art. 1, § 8, cl. 12 provides:

> The Congress shall have power . . .
>
> [12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; . . .

The provisions of 10 U.S.C. §§ 672(b) and (d) read:

> (b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be.
>
> * * *
>
> (d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active

> duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned.

Pub. L. 99-661, § 522, 100 Stat. 3871, enacted November 14, 1986, and codified at 10 U.S.C. § 672(f) reads:

> (f) The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

STATEMENT OF FACTS

The facts, as set forth in the parties' stipulation (App. 7a-12a) are straightforward and undisputed:

In or about September, 1987, the National Guard Bureau within the U.S. Department of Defense stated its intent to order the "65th Public Affairs Detachment, Massachusetts Army National Guard," to active duty for training in Central America from May 28 to June 11, 1988 ("the training assignment") (App. 8a).

The Massachusetts National Guard asked to be relieved of the training assignment. But, by letter dated January 25, 1988, the Chief of the National Guard Bureau informed the Governor of Massachusetts that the National Guard Bureau had disapproved the request for relief and had scheduled the members of the unit for deployment for training in their "federal status as members of the Army

National Guard of the United States. . ." (App. 10a).

The Governor did not consent to the training assignment, although he stated his intention to comply with the order until it had been stayed or declared unconstitutional. He objected to the location, purpose, type and schedule of training. But for 10 U.S.C. § 672(f) (also known as "the Montgomery Amendment"), he would not have permitted the 65th Public Affairs Detachment to be assigned to training in Central America (App. 11a-12a).

In the event that other Massachusetts National Guard units are called to active duty for training in Central America, the Governor intends to withhold consent if he objects to the location, purpose, type

or schedule of such training. As to such future assignments, he intends to comply with § 672(f) until that section has been stayed or declared unconstitutional (App. 12a).

STATEMENT OF PRIOR PROCEEDINGS

The Commonwealth of Massachusetts and its Governor (collectively, the "Commonwealth") brought this case in the District Court pursuant to 5 U.S.C. § 702, 28 U.S.C. §§ 1331, 1346, 2201 and 2202, in January, 1988. The complaint sought to preserve the Commonwealth's power over training its militia. U.S. Const. art. 1, § 8, cl. 16 (". . . reserving to the States respectively. . . the Authority of training the

Militia. . ."). ("the Militia Training Clause").

The District Court held a hearing on the merits, based upon the facts stipulated by the parties. On May 6, 1988, the Court issued an opinion and entered judgment for the defendants. The Court held, essentially, that the power of Congress "[t]o raise and support Armies" overrides the Constitutional reservation to the states of "the Authority of training the Militia. . . ." (App. 37a-38a).

The Commonwealth filed its notice of appeal on May 9, 1988. After briefing and argument, the Court of Appeals for the First Circuit issued a per curiam decision on October 25, 1988, affirming the judgment on the basis stated in the

District Court's opinion (App. 1a-5a).[1/]

1/ Although the specific training mission scheduled for May 28, 1988, through June 11, 1988, has been completed, the United States' brief in the First Circuit (at p. 16, n. 9) confirmed that it is virtually certain that another Massachusetts National Guard unit will again be ordered to training overseas in the future. Missions under 10 U.S.C. § 672(b) are limited to 15 days per year. In addition, the facts show that the matter of the May 28 - June 11 mission only became ripe sometime between November, 1987 and January 25, 1988. The approximately six-month period from ripeness to completion of the mission is not sufficient to obtain full judicial treatment of the issue. The issues raised in the complaint are therefore capable of repetition yet evading review. See e.g., Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602-603 (1982); Bellotti v. Baird, 428 U.S. 132, 137, n. 7 (1976). The United States' brief in the First Circuit agreed. By deciding the case on the merits, the First Circuit implicitly agreed as well.

REASONS FOR GRANTING THE WRIT

This Court has held that "the National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16, of the Constitution." Maryland, for the use of Levin v. United States, 381 U.S. 41, 46, vacated and modified on other grounds, 382 U.S. 159 (1965). In holding that Congress may abrogate the States' reserved powers, the opinions below conflict with the language, purpose and history of the Militia Training Clause, with basic principles of constitutional analysis articulated by this Court, and with a recent decision of the Eighth Circuit. Review by this Court is essential in order to resolve these con-

flicts, which concern an important issue of federal and state authority.

I. THE DECISION BELOW RAISES AN IMPORTANT QUESTION CONCERNING THE VITALITY OF THE MILITIA TRAINING CLAUSE, WHICH SHOULD BE SETTLED BY THIS COURT.

The scope of the Militia Training Clause, and its interaction with the Armies Clause in the absence of war or national emergency, have never been the subject of a holding by this Court. See Perpich v. United States Department of Defense, _____ F.2d _____, (8th Cir., December 6, 1988), slip op. at 23-27, petition for rehearing en banc granted, January 3, 1989; see also id., slip op. at 69 (Magill, J., dissenting). Doubtless, this is because Congress never asserted federal power over peacetime

training of the militia until 1986. The clash of sovereign powers precipitated by the Montgomery Amendment raises a federal question of undeniable importance.

The Militia Training Clause is central to the preservation of the very nature of the militia (i.e., National Guard). In contrast to federal "troops," raised and maintained under the Armies Clause, the militia consists of citizen-soldiers and is a hybrid organization, subject to both state and federal control. United States v. Miller, 307 U.S. 174, 178-179 (1939).[2/] The state's power over its own militia insures that

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2/ See Mela v. Callaway, 378 F.Supp. 25, 28 (S.D.N.Y. 1974) (The National Guard is "basically a state organization.").

the militia will not be dominated solely by the national government, unless Congress or the President declares the need to control the militia for purposes other than peacetime training. See The Records of the Federal Convention of 1787, Vol. II, pp. 330-331 (M. Farrand, ed.) (Yale U. Press 1911) (Delegate Ellsworth remarked that the national government could not "accommodate itself to the local genius of the people.")

This case involves precisely the situation in which the Constitution expressly reserves authority to the states. It is stipulated that the federal government ordered the Massachusetts National Guard to active duty solely for the purpose of militia training (App. 8a, 10a-12a).

The assertion of federal authority over training the militia without state consent destroys the states' "preponderating influence over the militia," contrary to the framers' intent. See Federalist No. 29 (Hamilton) (Mentor Ed.), p. 186. It eliminates any meaningful "contrast" between federal "Troops" and "the Militia," "which the States were expected to maintain and train. . . ." See Miller, supra, 307 U.S. at 178-179. The decisions below uphold legislation that alters the essential character of the militia, and the Constitutional scope of state authority, without benefit of a Constitutional Amendment.

These profound changes, enacted by Congress with minimal debate,[3/] affect 54 National Guard units, in all fifty states, the Commonwealth of Puerto Rico, the District of Columbia, Guam and the Virgin Islands. The Constitution reserves to each of them an authority to train the Militia, which the Montgomery Amendment now purports to take away.

3/ In 1986, a Senate subcommittee began to explore whether the gubernatorial consent provisions in 10 U.S.C. § 672(b) and (d) should be abolished. See Perpich, supra, slip op. at 46-47. The Department of Defense hoped the issue would fade over time, and the Senate subcommittee took no action. Id.

One month later, Representative Montgomery proposed an amendment to the Defense Authorization Act of 1987. Cong. Rec. H6264 (daily ed. Aug. 14, 1986). Debate was limited to ten minutes and there were no hearings on the amendment before the House vote. Several Representatives noted the impropriety of considering such far reaching legislation without hearings. Id. at H6262-68.

The Courts below perceived a conflict between the Militia and Armies Clauses and held that the Armies Clause prevailed. But there is no inherent conflict between the clauses in the context of training the militia, for the authority of training the militia in peacetime is reserved to the states and denied to Congress. The Constitution provides fully for the national defense by granting Congress and the President authority not only over federal "troops" (i.e. not the militia), but also over wartime or operational missions of the militia -- other than training. The Militia Training Clause requires that Congress or the Executive, in order to exercise authority over the militia, need only declare that the mission in question is

operational, rather than for training. This requirement is not burdensome, but it does preserve the accountability of the federal government.

A conflict between the two clauses would exist only if the respondents' premise, that Congress may make the militia a federal army and thereby exercise authority over peacetime militia training, were tenable. But this assertion begs the question and denies any effect or significance to the Militia Training Clause. The Justice Department concedes that its position makes the very existence of the militia dependent upon Congress (App. 31a).

By contrast, under the Commonwealth's understanding of the Constitution, there

is no conflict. The states do not claim any right to interfere with federal authority over "troops," and regardless of state consent, Congress may lawfully make the militia part of the army in case of insurrection or rebellion, to execute the laws, or in the event of a declared national exigency. Perpich, supra, slip op. at 33, n. 24.

The opinion below acknowledged that, absent the wartime context involved in the principal case upon which it relied, Selective Draft Law Cases, 245 U.S. 366 (1918), the present controversy is "less compelling. . . for priority of the Armies Clause." (App. 37a). In this "less compelling" context of peacetime

militia training, no necessary conflict exists between constitutional provisions.

In short, the severe threats to the concept of the militia and to principles of state sovereignty and federalism, presented by the decision below, deserve review by this Court.

II. THE MODE OF ANALYSIS EMPLOYED BY THE COURTS BELOW CONFLICTS WITH PRINCIPLES ESTABLISHED IN DECISIONS OF THIS COURT.

In addition, the District Court's theory -- that the Armies Clause enables Congress to do that which the Militia Clause specifically prohibits -- conflicts directly with this Court's statements regarding the National Guard and with this Court's holdings establishing modes of Constitutional interpretation.

In Maryland v. United States, supra, 381 U.S. at 46-47 and n. 8, the Court cited the Militia Clause as the sole constitutional basis for the legislation that provides "[t]he basic structure" for the present day National Guard. The Court also stated that "[t]he National Guard is the modern Militia reserved to the States by Art. I, § 8, cls. 15, 16, of the Constitution." Id. at 46. The decision below conflicts with these rulings.

In Miller, supra, 307 U.S. at 178-179, the Court described the constitutional "contrast" between "[t]he Militia which the States were expected to maintain and train" and the "[t]roops which they were forbidden to keep without consent of Congress." (emphasis

added). The District Court's decision ignores that ruling and minimizes any meaningful difference between the National Guard and an Army.

The District Court's opinion even conflicts with statements made in the very decision upon which it relied most heavily, Selective Draft Cases, supra. In that case, the Court referred to the National Guard as "the organized body of militia within the States as trained by the States under the direction of Congress. . ." Id., 245 U.S. at 387 (emphasis added). This Court declared that the Militia Clause left the "carrying out of" (i.e., the authority over) "training of the militia . . . to the States." Id., 245 U.S. at 383. The Selective Draft Cases, supra, 245 U.S.

at 382-84, do hold that the Armies Clause can supersede the Militia Clause in certain situations, and that the draft laws enacted during the national exigency presented by World War I were valid. That holding is strictly limited to, and is indeed fundamentally predicated upon, the existence of a national exigency. Here, the federal government has expressly disclaimed any such emergency (App. 8a, 10a-12a). Since the issue in this case involves only peacetime training, the Armies Clause cannot trump any other constitutional provision.

The use of the Armies Clause to override the express prohibition of the Militia Training Clause violates fundamental rules of construction that derive from the very nature of our Constitution.

The powers granted to Congress "are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution." Williams v. Rhodes, 393 U.S. 23, 29 (1968). Yet, in the Montgomery Amendment, Congress asserted power under the Armies Clause to violate the Constitutional reservation of state authority over militia training.

Moreover, under the rulings below, the express exception to Congressional power, set forth in the Militia Training Clause, is meaningless. Such a result violates the fundamental and longstanding principle that our Constitution is to be construed as an harmonious whole, with

no meaningless clauses. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803).

III. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RECENT DECISION OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT, WHICH HELD THE MONTGOMERY AMENDMENT UNCONSTITUTIONAL.

The decision below conflicts directly with the Eighth Circuit's decision in Perpich, supra, which expressly rejected the reasoning and holding below.[4/]

4/ It also conflicts with decisions of the United States Court of Military Appeals. United States v. Peel, 4 M.J. 28, 29 (C.M.A. 1977) (Because of 10 U.S.C. § 672(d) and the Militia Training Clause, state authorities have "the sole constitutional and statutory authority to order a national guardsman to active duty.") (emphasis added). Accord, United States v. Self, 13 M.J. 132, 135 (C.M.A. 1982); United States v. Hudson, 5 M.J. 413, 418 (C.M.A. 1978).

In Perpich, the Eighth Circuit held "that the Montgomery Amendment, which deprives the states of the 'Authority of training the Militia,' violates the Constitution of the United States." Id., slip op. at 4. The court relied on several factors in reaching its holding.

The plain language of the Militia Training Clause precludes legislation that deprives the states of such control without their consent. The court's extensive review of the evidence of the framers' purposes in drafting the Militia Training Clause demonstrated that the framers intended the states to exercise control over training the militia, at least in the absence of a Presidential or Congressional declaration of a national emergency. The court examined

the Selective Draft Law Cases, supra, and Cox v. Wood, 247 U.S. 3 (1918), and noted that the holdings in those cases did not bear upon the States' reserved power under the Militia Training Clause during peacetime. Rather, this Court's dicta in the two cases would allow the Armies Clause to supersede state authority over the militia only in the event of a declared "national exigency." The Eighth Circuit observed that all Congressional legislation until 1986 had preserved the states' authority over the National Guard in the absence of a national exigency.[5/] Finally, the

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5/ See Act of January 21, 1903, ch. 196, 32 Stat. 775, 777-778; National Defense Act of 1916, ch. 134, 39 Stat. 166, 198, 209; National Defense Act Amendments of 1933, ch. 87, 48 Stat. 153, 155, 156, 160; Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481.

court rejected the Defense Department's assertion that the states were impermissibly intruding into foreign policy, and noted that the federal government "provides no evidence that the effectiveness of the national defense or of the National Guard will be diminished by an adherence to the constitutional principle of basic state control over the National Guard forces" in peacetime. Id., slip op. at 54 (emphasis in original). That conclusion applies equally to this case.

The Eighth Circuit considered and expressly rejected the rationale and result of the decision below. Id., slip. op. at 31-33, n. 24. First, it noted, the court below never explained where it drew the line between federal and state

authority, nor why the Montgomery Amendment fell on the permissible side of the line. Second, the Eighth Circuit disagreed with the contention below that it is absurd to preclude federal training missions without state consent while permitting operational missions without such consent; prior to 1986, this allegedly absurd scheme was indisputably the state of the law, as enacted by Congress. See 10 U.S.C. §§ 672(a), (b), (d), 673(a), 673b(a). Finally, the Eighth Circuit noted that, contrary to the implication below, App. 40a-41a, this case does not turn upon whether a particular mission is wise, but upon a question that is appropriate for judicial resolution, namely whether and to what extent the

federal government can take away the states' constitutionally reserved authority over the militia, particularly in peacetime.

The conflict between Perpich and this case is direct and immediate. There is no basis for distinguishing the two cases. The same statute is challenged in each case, upon essentially the same facts. The need for resolution of this conflict by this Court is serious.[6/]

6/ Perpich is presently scheduled for argument before the Eighth Circuit en banc on February 16, 1989. Whatever action the Eighth Circuit ultimately takes, this case raises important issues that should be considered by this Court for the reasons stated in parts I and II of the argument, above.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the opinion and order of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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Dated: January 18, 1989

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1510

MICHAEL S. DUKAKIS, ETC., ET AL.
Plaintiffs, Appellants,

v.

UNITED STATES DEPARTMENT
OF DEFENSE, ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Robert E. Keeton,
U.S. District Judge]

Before

Coffin, Circuit Judge,

Timbers,* Senior Circuit Judge,

and Torruella, Circuit Judge.

Douglas H. Wilkins, Assistant Attorney General, with whom James M. Shannon, Attorney General, and Eric Mogilnicki, Assistant Attorney General, were on brief for appellants.

William Damsel, Assistant Attorney General, Chief Counsel's Staff, Anthony J. Celebrezze, Jr., Attorney General, State of Ohio, James E. Tierney, Attorney General of Maine, Hubert H. Humphrey, III, Attorney General of Minnesota, and Jeffrey L. Amestoy, Attorney General of Vermont, on brief for States of Ohio, Maine, Minnesota and Vermont, Amici Curiae.

*Of the Second Circuit, sitting by designation.

John R. Bolton, Assistant Attorney General, with whom Frank L. McNamara, Jr., United States Attorney, Anthony J. Steinmeyer and Deborah Ruth Kant, Civil Division, Department of Justice, and Major James N. Hatten, Office of the Judge Advocate General, Department of the Army, were on brief for appellees.

Richard E. Gardiner and Stephen P. Halbrook on brief for Firearms Civil Rights Legal Defense Fund, Amicus Curiae.

Francis C. Newton, Jr., on brief for National Guard Association of the United States, the Enlisted Association of the National Guard of the United States, the Adjutants General Association of the United States and the Sovereign States of Alabama, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Missouri, Nevada, New Mexico, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah and Wisconsin, Amici Curiae.

Daniel J. Popeo, Paul D. Kamenar, and Vicki S. Marani on brief for the Washington Legal Foundation, Congressmen Robert K. Dornan, Robert E. Badham, Joe Barton, Sherwood L. Boehlert, William E. Dannemeyer, Tom DeLay, Michael DeWine, David Dreier, Elton Gallegly, John Paul Hammerschmidt, Wally Herger, Duncan Hunter, Henry J. Hyde, Robert J. Lagomarsino, Jerry Lewis, Bill Lowery, Donald E. "Buz" Lukens, Alfred A. McCandless, Jim McCrery, Carlos J. Moorhead, Michael G. Oxley, Ron Packard, Charles Pashayan, Jr., Norman D. Shumway, Gerald B.H. Solomon, Bob Stump, Don Sundquist, Patrick L. Swindall, William M. Thomas, Vin Weber, George C. Wortley,

Christopher Cox, and the Allied Educational Foundation, Amici Curiae.

William J. Guste, Jr., Attorney General, Gary L. Keyser, Assistant Attorney General, W. Arthur Abercrombie, Jr., Special Assistant Attorney General, and Peter V. Grillo, Local Counsel, on brief for the State of Louisiana, Amicus Curiae.

OCTOBER 25, 1988

[As Amended October 25, 1988]

Per Curiam. Having examined the briefs of the parties and amici on both sides, and having had the benefit of oral argument, we affirm the judgment on the basis stated in the district court's well reasoned opinion, 686 F. Supp. 30 (D. Mass. 1988).

Affirmed

APPENDIX B

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL S. DUKAKIS, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF DEFENSE, et al., Defendants.	)	CIVIL ACTION NO. 88-227-K

OPINION
May 6, 1988

KEETON, District Judge.

This action was brought by the Governor of Massachusetts and the Commonwealth of Massachusetts against the United States Department of Defense and other federal agencies and officials.

Plaintiffs' complaint asks this court to declare the Montgomery Amendment, 10 U.S.C. § 672(f), unconstitutional under the Militia Training Clause, U.S. Const. art. I, § 8, cl. 16, insofar as section 672(f) restricts the authority of the Governor to withhold consent to training, outside the United States, of members or units of the Massachusetts National Guard or the Massachusetts unit of the National Guard of the United States.

On April 8, 1988, the court held a trial on stipulated facts. The court received the parties' Stipulation (Docket No. 11) as the only evidence in the case.

I. Stipulated Facts

Exhibit A to the stipulation of facts is a September 29, 1987, communication

from the National Guard Bureau ("NGB") to the Commonwealth of Massachusetts, Military Division. That communication states that "with your concurrence and permission" the NGB will nominate the 65th Public Affairs Detachment, Massachusetts (65th PAD) for a training mission in Central America May 28, 1988 through June 11, 1988. The communication further states that "[i]f you nonconcur, you must provide your reasons or rationale for nonconcurring" by October 15, 1987.

Exhibit B to the stipulation is an October 5, 1987, communication from the Adjutant General of Massachusetts to the NGB, requesting that the October 15, 1987, reply date be extended to November 30, 1987. Exhibit C is an October 30, 1987, memorandum from the Adjutant

General to the NGB stating:

> This State submits a nonconcurrence response for the following reasons:
> a. During the period 1 September 1987 through 30 June 1988, there has been an increased demand for public affairs support within the Massachusetts National Guard which has resulted in the assignment of certain assets of the 65th [PAD] to be scheduled to assist in meeting those demands. Certain activities for which the 65th [PAD] has or will be employed are the result of both an increase in and the intensity needed to insure that such activities are carried out effectively. These activities are in addition to those normally conducted by the unit during the course of the year.

The memorandum cites nine such activities planned for members of the 65th PAD.

Exhibit D is a responsive communication from the NGB to the Adjutant General stating, in part:

> Your request for nondeployment of the 65th [PAD] to Latin America

during FY 88 is not favorably considered.

Exhibit E is a January 25, 1988, letter from the Chief of the NGB to Governor Dukakis. That letter informs the Governor that the Massachusetts National Guard's request to be relieved from the Central American deployment was not approved. The letter further explains that the 65th PAD will perform the training in their "federal status as members of the Army National Guard of the United States," and discusses the provision in section 672(f) that a governor cannot withhold consent to an order to federal active duty outside the United States "because of any objections to the location, purpose, type or schedule of such active duty." The letter concludes by stating:

Section 108 of Title 32, United States Code provides for complete or partial withholding of federal funds from the National Guard of a State that fails to comply with federal requirements. Congress has specifically called for application of this provision of law in the event of violation of Section 672(f) of Title 10, United States Code.

I bring this matter to your attention because of your continuing interest in National Guard training in Central America.

The stipulation sets forth the following additional facts:

5. The [NGB] intends to order the 65th [PAD], Massachusetts, in its federal status as National Guard of the United States, a ready reserve component of the United States Army, into active duty on May 28, 1988 through June 11, 1988, pursuant to 10 U.S.C. § 672(b) or (d). This active duty is intended for training.

6. As stated in the complaint, Governor Dukakis objects and would withhold consent to the above active duty, but for the operation of 10 U.S.C. § 672(f). As stated in the complaint, Governor Dukakis objects

to the location, purpose, schedule and type of this training.

7. As stated in the complaint, Governor Dukakis intends to comply with 10 U.S.C. § 672(f) until it has been declared unconstitutional or otherwise stayed. As stated in the complaint, but for 10 U.S.C. § 672(f), Governor Dukakis would not permit the members of the National Guard of the United States, who are also members of the Massachusetts National Guard, including the 65th [PAD], to be ordered to active duty in Central America at this time.

8. In the event that members of other units of the National Guard of the United States, who are also members of the Massachusetts National Guard, are ordered to active duty in Central America, the Governor, as stated in the complaint, intends to object to such training if he objects to the location, purpose, type or schedule of the training. As stated in the complaint, with regard to future assignments, Governor Dukakis intends to comply with 10 U.S.C. § 672(f) until that section has been stayed or declared unconstitutional.

II. Constitutional and Statutory Provisions

The following constitutional provisions are at issue in this case:

> The Congress shall have Power . . .
>
> To raise and support Armies . . .;

U.S. Const. art. I, § 8, cl. 12 ("the Armies Clause").

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

U.S. Const. art. I, § 8, cls. 15, 16 (referred to jointly as "the Militia Clause").

The following statutory provisions concern the active duty of units or members of the National Guard of the United States ("NGUS"):

> § 672. Reserve components generally
>
> (b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than 15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State. . . .
>
> (d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection

> without the consent of the governor . . . of the State . . . .

In 1985 and 1986, several governors withheld (or indicated their intention to withhold) their consent to active duty deployment of their National Guard units to Central America. In 1986, Congress responded by passing the Montgomery Amendment, which modifies sections 672(b) and (d) as follows:

> (f) The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

10 U.S.C. § 672(f).

III. Historical Background

Under the Militia Act of 1792, virtually every able-bodied man between 18 and 45 was enrolled in the militia and required to arm himself at his own expense. This statute was the only permanent legislation organizing the militia for over one hundred years. Wiener, The Militia Clause of the Constitution, 54 Harv. L. Rev. 181, 187 (1940) (hereinafter "The Militia Clause"). From the time of ratification of the Constitution through the Spanish War, the militia was incapable of adequately serving the country's needs. For example:

> When the Mexican War broke out, the militia was unavailable, because of the constitutional limitations; service in Mexico was no part of repelling invasions or of suppressing insurrections. Accordingly, Congress authorized the organization of volunteers, who, being organized under

> the power "to raise and support Armies," were not subject to the restrictions of the militia clause. . . .

Id. at 190 (footnote omitted).

After the Civil War, "[t]he militia contemplated by the Act of 1792, that is, the whole body of the people, virtually ceased to exist, and the States relied more and more upon select bodies of men, trained after a fashion and without uniform supervision, who became known as National Guards." Id. at 191.

During the Spanish War

> [t]he basic constitutional problem in 1898 was the same as during the Mexican War a half-century earlier: service in Cuba, in Puerto Rico, in the Philippines, was outside the constitutional obligation resting upon militia.

Id. at 192.

In 1901, President Theodore Roosevelt reported to Congress: "Our militia law is obsolete and worthless." Id. at 194. In 1903, Congress passed the Dick Act, which provided for an organized militia to be known as the National Guard. The new National Guard was to be federally funded and conform to regular army organization. Id. at 195. The House Report accompanying the Dick Act stated:

> [T]he services required of the militia can be rendered only upon the soil of the United States . . . . It was the hereditary fear of standing armies, as a menace to liberty in time of peace, which led the framers of the Constitution to provide that the militia should always remain a militia of the States. It was never designed to be a militia of the United States, nor under the control of the President, except when called into actual service under some one of the [clause 15] contingencies.

Id. at n. 74.

In 1908, Congress enacted a measure providing that the organized militia should be available for service outside the territory of the United States. This act was apparently the result of a compromise between the War Department and the National Guard, whereby the National Guard "waived" the territorial limitations on its service. Id. at 197. In 1912, the Attorney General held that such extraterritorial use of the militia was unconstitutional. Id. at 198.

Congress' solution to this constitutional dilemma was the National Defense Act of 1916, which "federalized" the National Guard. Id. at 199. Under this statute, all members of the National Guard were required to take an oath to obey both the President and the governor

of their state. This dual oath allowed the President to draft National Guard members into federal service, at which time they were considered discharged from the militia. The National Defense Act also provided for some federal control over the appointment of National Guard officers by prescribing their qualifications and providing for their federal recognition. Id. at 201.

In 1918, the Supreme Court decided the Selective Draft Law Cases, 245 U.S. 366 (1918), in which the Court upheld Congress' power to compel military service in the face of a claim that the Militia Clause limited Congress' power to draft under the Armies Clause. This holding was reaffirmed in Cox v. Wood, 247 U.S. 3 (1918). But see Maryland v.

United States, 381 U.S. 41, 46-47 (1965) (indicating that 1916 "federalization" of National Guard was accomplished pursuant to Congress' Militia Clause power), vacated on rehearing, 382 U.S. 159 (1965).

In 1933, Congress made the National Guard a permanent part of the Army by creating a "dual-enlistment" system.

> It did this by conferring a new status on the Guard, by constituting it a reserve component of the Army, to be known as the National Guard of the United States. In its militia capacity, the National Guard was organized and administered under the militia clause of the Constitution, and available only for limited duties . . . . The National Guard of the United States, in its capacity as a reserve component of the Army, was organized and was to be administered under the army clause.
>
> In place of the former draft into federal service, as individuals, the Guard would be ordered into federal service as units. . . . Upon being relieved from federal service,

> all individuals and units would revert to their National Guard status
> . . . .
>
> Accordingly, the National Guard has today a dual status, and every Guardsman is a reservist as well as a militiaman.

The Militia Clause at 208 (footnotes omitted).

It has been stated that the 1933 Act "placed the final mark of inadequacy on the militia clause. For the 1933 Act proved conclusively that a well-regulated militia is impossible of attainment under the militia clause, and can be organized only by resort to the plenary and untrammelled powers under the army clause." Id. at 209.

IV. The Constitutionality of the Montgomery Amendment

At issue in this case is the constitutional status of the modern National

Guard. Does Congress have power under the Armies Clause to order members of the National Guard into active duty under sections 672(b) and (d) for purposes arguably inconsistent with the Militia Clause -- specifically, to train outside the United States without state consent?

Plaintiffs argue that members of the National Guard never cease to be members of the "militia" and, therefore, are always subject to the limitations of the Militia Clause. Defendants argue that National Guard members ordered into active duty under sections 672(b) and (d) are acting pursuant to Congress' broad army power, unconstrained by the Militia Clause. It is plaintiffs' contention that the reservation of power to the states, expressed in the Militia

Clause, limits congressional power under the Armies Clause as well. Otherwise, plaintiffs argue, the clause purportedly reserving power to the states would be meaningless. Congress could simply bypass the reservation of power to the states over training the militia by calling the militia to active duty under the Armies Clause, which contains no comparable limitation on congressional power.

The rationale of plaintiffs' contention sweeps very broadly. The only purposes for which Congress is authorized by clause 15 to call forth the militia are "to execute the Laws of the Union, suppress Insurrections and repel Invasions." Thus, unless clause 16 is given meaning beyond that given to clause 15, under plaintiffs' rationale the scheduled

training mission to Central America is unconstitutional with or without the consent of Governor Dukakis. This is so because such a foreign mission can in no way be characterized as necessary and proper for carrying out any of the powers granted in clause 15.

In view of these explicit and implicit premises of plaintiffs' arguments, the rationale of plaintiffs' challenge to the constitutionality of section 672(f) must be understood as applying not merely to an order for two weeks of training outside the United States but also to the entire system that is commonly referred to as "dual enlistment." See plaintiffs' Substitute Memorandum in Support of Complaint for Declaratory and Injunctive Relief (Docket No. 18) at

33-34 (arguing that clauses 15 and 16 become "dead letters" if dual-enlistment theory accepted). But see id. at 30 n. 18 ("This case does not present the question of the dual enlistment concept in contexts (other than training), where no express reservation of state authority exists.").

As explained in Part III above, "dual enlistment" was created by legislation enacted in 1933. That legislation authorizes simultaneous enlistment in the National Guard of a state and in a unit of the United States Army. For example, as occurred in this case according to the Stipulation of the parties, one may enlist in both "the 65th [PAD], Massachusetts" and "the National Guard of the United States, a ready reserve component of the United States Army." Stipulation,

para. 5. In sustaining "dual enlistment" legislation against constitutional challenge, the Fifth Circuit declared that "[t]he express purpose of the dual enlistment concept was to avoid the limitations of the militia clause and to organize the National Guard under the broader power to raise and support armies." Johnson v. Powell, 414 F.2d 1060, 1063 (5th Cir. 1969).

In Johnson, the Fifth Circuit refused to release members of the Kentucky National Guard from active duty in Vietnam even though "[t]he Vietnam conflict involves none of [the] three situations [listed in the Militia Clause]." Id. The court concluded that "the dual enlistment system was a proper exercise of power necessary and proper to the raising

and supporting of armies." Id. at 1064. The court cited the Selective Draft Law Cases and Cox v. Wood for the principle that the "power [under the Armies Clause] is not limited to the conditions of service set forth in the militia clause." Id. at 1063.

Similarly, in Drifka v. Brainard, 294 F.Supp. 425 (W.D. Wash. 1968), the court endorsed the dual-enlistment concept and rejected plaintiffs' contention that, as members of a state militia, they could be called forth by Congress only for the three purposes set forth in the Militia Clause. But see Johnson v. Powell, 393 U.S. 920 (Douglas, Circuit Justice 1968) (finding issue of National Guard deployment to Vietnam moot but stating that contention that National Guard members were being deployed "not as

members of the 'militia' but as members of the Ready Reserve" "might in time prevail, but it is not free of doubt; and I am not yet persuaded that either the Army or the Solicitor General can play loosely with the concept of 'militia' as used in the Constitution"); United States v. Peel, 4 M.J. 28, 29 (C.M.A. 1977) (stating gubernatorial consent provision of section 672(d) has "constitutional foundation" and state authorities have "sole constitutional and statutory authority to order a national guardsman to active duty") (emphasis added).

Under the dual-enlistment rationale, upheld as constitutional by the Johnson and Drifka courts, the states' authority over training of the militia, reserved in the Militia Clause, does not apply to

the period during which members of the militia are on active duty as part of the NGUS. See Perpich v. United States Department of Defense, 666 F. Supp. 1319, 1323-24 (D. Minn. 1987) (part of rationale for decision of case like the case at bar), appeal pending, No. 87-5345-MN. It may be debated whether this substantive outcome should be described as (a) one under which the Militia Clause does not apply because the persons serving are not "members of the militia" while on active duty as part of the NGUS, or instead (b) one under which at all times they have a dual status, governed in part by the Militia Clause and in part by the Armies Clause. The Johnson, Drifka, and Perpich decisions are precedents for the outcome stated at the beginning of this paragraph, regard-

less of the way one may choose to describe it.

Counsel for defendants conceded at oral argument that this conception of the dual-enlistment system makes the militia dependent upon Congress for its existence because, in a practical sense at least, the militia exists only when Congress does not want or need it as part of the Army. Under such a dual-enlistment concept, pushed to the logical limit, Congress could at any time order the entire militia into active duty year-round, thus abolishing the militia and leaving the Militia Clause without practical application. A plain reading of the Constitution supports plaintiffs' contention that Congress cannot "abolish" the militia by transforming it into part of the Army. See U.S. Const. amend. II

("A well regulated Militia, being necessary to the security of a free State. . . ."); Militia Clause, supra ("reserving to the states respectively . . . the Authority of training the Militia according to the discipline prescribed by Congress"). Nevertheless, Johnson, Drifka, and Perpich make it clear that Congress is not violating the Militia Clause each time it authorizes members of the militia to serve as NGUS members on active duty, even though this could be characterized as a temporary transformation of the militia into a unit of the Army.

Essentially the same point is stated in the observation that, under the rationale of Selective Draft Law Cases, as ordinarily understood, Congress might

achieve the same result (characterized as "abolishing" the militia) without a dual-enlistment system, simply by drafting all persons (whether or not members of the militia) into the Army as individuals.

The spectre of pressing the dual-enlistment rationale to its logical limit is matched by the counterpoint that if the Militia Clause is interpreted as limiting Congress' power to order the militia to active duty as part of the Army, then the Armies Clause would be without practical application because the states could enlist all citizens in the organized militia and thereby "abolish" the Army.

More important than this clash of point and counterpoint about "abolishing" either the Army or the militia is the

Supreme Court's explanation of why its result in Selective Draft Law Cases is consistent with the framers' intent. In speaking to the interrelationship between the Armies Clause and the Militia Clause, the court explained that the framers of the Constitution delegated all governmental power over -raising armies to Congress.

> But the duty of exerting the power thus conferred in all its plenitude was not made at once obligatory but was wisely left to depend upon the discretion of Congress as to the arising of the exigencies which would call it in part or in whole into play. There was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it but left an area of authority requiring to be provided for (the militia area) unless and until by

> the exertion of the military power of Congress that area had been circumscribed or totally disappeared. This, therefore, is what was dealt with by the militia provision. It diminished the occasion for the exertion by Congress of its military power beyond the strict necessities for its exercise by giving the power to Congress to direct the organization and training of the militia (evidently to prepare such militia in the event of the exercise of the army power) although leaving the carrying out of such command to the States.

Selective Draft Law Cases, 245 U.S. at 382-83 (emphasis added).

With respect to the limited congressional uses of the militia outlined in clause 15, the Court reasoned that such a provision

> thus again obviat[ed] the necessity for exercising the army power to the extent of being ready for every conceivable contingency . . . . But because under the express regulations the power was given to call for specified purposes without exerting the army power, it cannot follow

> that the latter power when exerted was not complete to the extent of its exertion and dominant.

Id. at 383 (emphasis added).

The Court has made clear, therefore, that Congress' power to raise armies is "susceptible of narrowing the area over which the militia clause operate[s]." Id. at 384. The Court in Cox v. Wood, 247 U.S. 3 (1918), reaffirmed the Selective Draft Law Cases, summarizing what was held in that decision as follows:

> [T]he authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause. . . . [T]he power to call for military duty under the authority to declare war and raise armies and the duty of the citizen to serve when called . . . knew no limit deduced from a separate, and for the purpose of the war power, wholly incidental, if not irrelevant and subordinate, provision concerning

> the militia, found in the Constitution.

Id. at 6 (emphasis added).

For the purpose of deciding the precise issue now before this court, one need not read the Court's opinion in Selective Draft Law Cases as a sweeping declaration that Congress is authorized, in all circumstances, by the Armies Clause to abolish the militia and thus bypass the reservation of power to the states in the Militia Clause. Selective Draft Law Cases arose in a context of national mobilization for war. The present controversy presents the issue of accommodation between the Armies Clause and the Militia Clause in a context less compelling than that of Selective Draft Law Cases for priority of the Armies Clause. Nevertheless, guided by the

decisions in the dual-enlistment cases as well as Selective Draft Law Cases, I conclude that the reservation of power to the states over "the Authority of training the Militia according to the discipline prescribed by Congress," expressed in the Militia Clause, does not override the legitimately exercised power of Congress "[t]o raise and support Armies."

Therefore, even if plaintiffs' challenge is read narrowly, as acknowledging Congress' power, in certain circumstances, to treat the National Guard in a manner that is inconsistent with the Militia Clause, and challenging only Congress' power to control the peacetime training of the National Guard, that position must fail.

To read the reservation in the Militia Clause as precluding, without consent of the respective states, all temporary calls to active duty in the Army where the motivation for the call is to provide training, would be to reach a rather extraordinary accommodation between the two separate clauses of the Constitution. Calls of militia units to temporary active duty in the Army would be allowable for other purposes legitimately perceived by Congress to be within the scope of those national interests for the protection of which the Armies Clause was drafted by the framers, but training to prepare units called to such active duty would be suspended during the period of active duty in the Army, or conducted, if at all, only under the auspices and

direction of the respective states. A court should reject any proposed interpretation of a text that attributes to it a meaning so unlikely to have been intended by those whose manifested meaning is controlling -- in this instance, the framers. Thus, even if Selective Draft Law Cases is not to be read as holding that the Militia Clause never in any circumstances limits Congress' power under the Armies Clause to call militia units to active duty, still I conclude that the Militia Clause reservation of power to the states over training does not apply to the circumstances presented by this case.

One more point -- implicit in all that has been said above -- is best made explicit. In general, disputes are to be resolved through political processes

(rather than in courts) where in essence they are disputes as to whether particular calls of units of the militia to temporary active duty, and the locations to which units are sent during such a period, do or do not serve national interests. Absent proof that a body to whom the responsibility and power for deciding such disputes has exceeded constitutional bounds in some way, courts cannot properly intrude. The record before this court falls short of presenting a case in which judicial intrusion would be appropriate.

In conclusion, the fact that, under the Supreme Court's rationale in Selective Draft Law Cases, the dual-enlistment system in some sense makes the militia dependent upon Congress for its existence does not render that

system unconstitutional. The Militia Clause retains meaning and purpose both (a) as it limits congressional power over the militia when it is not on active duty as a part of the army and (b) as it enables Congress to exercise more sparingly its broad army power. This blend of limiting and enabling functions serves the framers' intent that Congress have the power to provide for defense of the nation while maintaining only a small standing army. The Montgomery Amendment is a valid exercise of Congress' power under the Armies Clause and does not violate the Militia Clause.

Final judgment for defendants will be entered forthwith.

/s/
Robert E. Keeton
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL S. DUKAKIS, et al., Plaintiffs,	
v.	CIVIL ACTION NO. 88-227-K
UNITED STATES DEPARTMENT OF DEFENSE, et al., Defendants.	

FINAL JUDGMENT
May 6, 1988

Keeton, D.J.

In accordance with the court's Opinion this date, it is ORDERED: Judgment for defendants.

By the Court:
ROBERT J. SMITH, JR.,
Clerk

By: /s/
Joanne M.Mayo
Deputy Clerk

Supreme Court, U.S.
FILED
MAR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1223

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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18 pp

QUESTION PRESENTED

Whether the Montgomery Amendment, 10 U.S.C. 672(f) (Supp. V 1987)—which prohibits a State's governor from withholding consent to a unit of the National Guard's being ordered to active duty outside the United States on the ground that the governor objects to the location, purpose, type, or schedule of that duty—is a constitutional exercise of Congress's power under the Armies Clause, U.S. Const. Art. I, § 8, Cl. 12.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1223

COMMONWEALTH OF MASSACHUSETTS, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 859 F.2d 1066. The opinion of the district court (Pet. App. 6a-43a) is reported at 686 F. Supp. 30.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1988. The petition for a writ of certiorari was filed on January 21, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1933, Congress established the "dual-enlistment system" for the National Guard. Under this system, each

National Guardsman enlists simultaneously in two distinct organizations: (i) the Army or Air National Guard of a particular State, each a part of the organized militia of that State (see 32 U.S.C. 101(3)-(4), 101(6), 304) and (ii) the Army or Air National Guard of the United States, each a reserve component of the national armed forces (see 10 U.S.C. 101(11), 101(13), 261, 3261, 8261 (1982 & Supp. V 1987); 32 U.S.C. 101(5), 101(7)).[1] The National Guard of the United States (NGUS) is a wholly federal organization; when serving on active duty, NGUS personnel are relieved from duty in their respective state National Guards. 32 U.S.C. 325.

Congress has prescribed the conditions under which members of the NGUS may be ordered to active duty and the length of the periods during which service may be required for particular purposes. *E.g.*, 10 U.S.C. 672-675 (1982 & Supp. V 1987). For instance, in time of war or of national emergency declared by Congress, or when otherwise authorized by law, federal authorities may order any NGUS unit into active duty (other than for training) for the duration of the war or emergency and for six months thereafter. 10 U.S.C. 672(a). Under Section 672(b), a unit of the NGUS may be ordered to active duty for any purpose, with the consent of the governor of the State from which that unit comes, for up to 15 days a year.[2] And,

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[1] The history that led up to the adoption of this system is summarized in Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940).

[2] This section provides:

> (b) At any time, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, in an active status in a reserve component under the jurisdiction of that Secretary to active duty for not more than

under Section 672(d), any member of the NGUS may be ordered to active duty indefinitely, with his consent and the consent of the governor of the State of whose National Guard he is also a member.[3]

In 1986, after several governors expressed opposition to the Administration's Central American policy and indicated that they would withhold their consent to National Guard training missions in that region, Congress enacted the Montgomery Amendment, 10 U.S.C. 672(f) (Supp. V 1987). This provision prohibits a governor from withholding consent to an NGUS unit's active duty outside the United States because of any objection to the location, purpose, type or schedule of that duty:

> (f) The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.

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15 days a year. However, units and members of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor of the State or Territory, Puerto Rico, or the Canal Zone, or the commanding general of the District of Columbia National Guard, as the case may be.

[3] This section provides:

> (d) At any time, an authority designated by the Secretary concerned may order a member of a reserve component under his jurisdiction to active duty, or retain him on active duty, with the consent of that member. However, a member of the Army National Guard of the United States or the Air National Guard of the United States may not be ordered to active duty under this subsection without the consent of the governor or other appropriate authority of the State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia, whichever is concerned.

2. In September 1987, a unit of the NGUS in Massachusetts was designated to participate in a training mission in Central America from May 28, 1988, through June 11, 1988 (Pet. App. 8a). Petitioner Dukakis, the governor of Massachusetts, objected to that mission on grounds covered by the Montgomery Amendment (*id.* at 8a, 11a-12a). The National Guard Bureau responded that the unit was being ordered to active duty in its "federal status as members of the Army National Guard of the United States" and that the Montgomery Amendment prohibited the withholding of consent on the grounds petitioner Dukakis had expressed (*id.* at 10a-11a).

Petitioners then filed suit in the United States District Court for the District of Massachusetts, alleging that the Montgomery Amendment is unconstitutional under the Militia Clause, U.S. Const. Art. I, § 8, Cl. 16. The complaint sought declaratory relief to this effect and an injunction prohibiting respondents from ordering elements of the Massachusetts National Guard to active duty without the consent of the State's governor.

The case was tried by stipulation to the district court. In addition to recounting the events described above, the stipulation provided that, but for the Montgomery Amendment, petitioner Dukakis would withhold his consent (i) to the use of the NGUS unit from Massachusetts in the 1988 training mission and (ii) to future orders requiring other units of the NGUS in Massachusetts to participate in training in Central America if he objected to the location, purpose, type or schedule of the training (Pet. App. 11a-12a). However, the stipulation also stated that petitioner Dukakis would comply with the statute until it was declared unconstitutional or otherwise stayed (*ibid.*).

3. In a decision issued on May 6, 1988, the district court held that the Montgomery Amendment "is a valid

exercise of Congress' power under the Armies Clause and does not violate the Militia Clause" (Pet. App. 42a).[4]

The district court described the question presented by this case as whether Congress has "power under the Armies Clause to order members of the National Guard into active duty * * * for purposes arguably inconsistent with the Militia Clause—specifically, to train outside the United States without state consent" (Pet. App. 23a). It noted at the outset that the rationale of petitioners' position—that the Militia Clause limits Congress's power under the Armies Clause—would reach the entire dual-enlistment system, not just active duty for purposes of training (*id.* at 24a-25a). From this perspective, the court rejected petitioners' understanding of the relation between the Armies Clause and the Militia Clause. Citing decisions of lower federal courts that had upheld the dual-enlistment system,[5] the court concluded that "the states' au-

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[4] Under the Armies Clause, U.S. Const. Art. I, § 8, Cl. 12, Congress has the power:

> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years[.]

The Militia Clause confers power on Congress (U.S. Const. Art. I, § 8, Cls. 15-16):

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and]
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

[5] *Johnson* v. *Powell*, 414 F.2d 1060 (5th Cir. 1969) (use of National Guard units abroad in Vietnam War was authorized by the Armies Clause, even though it fell into none of the categories permitted by the Militia Clause); *Drifka* v. *Brainard*, 294 F. Supp. 425 (W.D. Wash. 1968).

thority over training of the militia, reserved in the Militia Clause, does not apply to the period during which members of the militia are on active duty as part of the NGUS" (*id.* at 29a-30a).

The district court found further support for that conclusion in the *Selective Draft Law Cases,* 245 U.S. 366 (1918), in which this Court upheld Congress's authority to draft members of the militia into the national armed forces. In those cases, this Court stated that the Militia Clause preserves state control over the militia only "to the extent that such control was not taken away by the exercise by Congress of its power to raise armies" (245 U.S. at 382-383). The district court acknowledged that this case presented "the issue of the accommodation between the Armies Clause and the Militia Clause in a context less compelling than that of the *Selective Draft Law Cases,*" but concluded nevertheless that the reservation to the States of " 'the Authority of training the Militia according to the discipline prescribed by Congress,' expressed in the Militia Clause, does not override the legitimately exercised power of Congress '[t]o raise and support Armies.' " Pet. App. 37a-38a.

The district court also concluded that petitioners' challenge to the dual-enlistment system would be without merit even if it could be limited to "Congress' power to control the peacetime training of the National Guard" (Pet. App. 38a). The court explained that an interpretation of the Armies and Militia Clauses that precluded ordering members of the NGUS to active duty for purposes of training would be "a rather extraordinary accommodation between the two separate clauses of the Constitution." Pet. App. 39a. Under that view, the court explained, Congress would have the authority to order the NGUS to active duty for purposes other than training, but training would have to be suspended during the period of

active service or conducted only under the auspices of the States. The court found that this interpretation attributed a meaning to the Constitution unlikely to have been intended by the Framers. *Id.* at 40a.

Finally, the district court noted, its interpretation of the Militia Clause would preserve that provision's meaning and purpose "both (a) as it limits congressional power over the militia when it is not on active duty as a part of the army and (b) as it enables Congress to exercise more sparingly its broad army power" (Pet. App. 42a).

4. In a *per curiam* decision issued on October 25, 1988, the court of appeals affirmed on the basis of the district court's opinion (Pet. App. 1a-5a).

ARGUMENT

The decision of the courts below is correct and is consistent with the *Selective Draft Law Cases* and with lower court decisions that have upheld the constitutionality of the dual-enlistment system. Although a divided panel of the Eighth Circuit recently issued an opinion holding that the Montgomery Amendment is unconstitutional, *Perpich* v. *Department of Defense,* No. 87-5345 (Dec. 6, 1988), the Eighth Circuit subsequently vacated that decision and granted rehearing *en banc.* Under these circumstances, there is at present no conflict in the circuits with respect to the question presented by this case, and further review of the lower courts' decision is therefore not warranted.

1. The power of Congress to "provide for the common Defence" and "raise and support Armies" obviously includes the authority to provide for the training of the national armed forces. See *Chappell* v. *Wallace,* 462 U.S. 296, 300 (1983); *Goldman* v. *Weinberger,* 475 U.S. 503, 508 (1986).[6] In Section 672, as modified by the Mont-

[6] That authority is also obviously not limited to times of declared war or national emergency. See *United States* v. *O'Brien,* 391 U.S.

gomery Amendment, Congress has expressly authorized Executive Branch officials to order the NGUS—reserve components of the national armed forces—into active duty for up to 15 days a year for any purpose, including training. This statute is clearly within Congress's constitutional authority to provide for the Nation's defense and raise and support its armed forces.

The lower courts correctly held that the Militia Clause does not withdraw Congress's authority, under the Armies Clause, to order members of the NGUS to active duty for purposes of training. In the *Selective Draft Law Cases, supra,* this Court rejected the basic premise of petitioners' position—the proposition that restrictions placed by the Militia Clause on federal authority over the militia also limit Congress's authority under the Armies Clause to require members of the militia to serve in the national armed forces. The Court explained, in terms that are fully applicable to this case, that the authority over the militia reserved to the States "did not diminish the military power [conferred on Congress by, *inter alia,* the Armies Clause] or curb the full potentiality of the right to exert it * * * " (245 U.S. at 383). Moreover, the Court continued, the fact that the Militia Clause permits the use of the militia only for specified purposes does not suggest that Congress's power under the Armies Clause "was not complete to the extent of its exertion and dominant." *Ibid.* Similarly, in *Cox* v. *Wood,* 247 U.S. 3, 6 (1918), the Court reaffirmed that Congress's powers to raise and support armies and to declare war "were not qualified or restricted by the provisions of the militia clause." See also *Tarble's Case,* 80

367, 377-378 (1968). See also *Selective Service System* v. *Minnesota Public Interest Research Group,* 468 U.S. 841, 861 n.3 (Powell, J., concurring).

U.S. (13 Wall.) 397, 408 (1871).[7]

2. Congress relied on the *Selective Draft Law Cases* when, precisely in order to assure that members of the National Guard would be available for service in the national armed forces without regard to the limitations of the Militia Clause, it enacted the dual-enlistment system. See H.R. Rep. No. 141, 73d Cong., 1st Sess. 1-6 (1933). Consistent with this Court's decision, the lower federal courts have sustained this system against the claim that it encroaches on power reserved to the States.

For instance, in *Johnson* v. *Powell,* 414 F.2d 1060 (1969), the Fifth Circuit rejected an argument that units of the National Guard could not be ordered to active duty in the NGUS to fight abroad in Vietnam. Though it recognized that the Vietnam War involved none of the situations in which Congress may call forth the militia as such, *i.e.,* executing the laws of the Union, suppressing insurrections, and repelling invasions, the court concluded that "the dual enlistment system was a proper exercise of power necessary and proper to the raising and supporting of armies" (*id.* at 1064) and that Congress's power under these provisions "is not limited to the conditions of service

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[7] *Maryland* v. *United States,* 381 U.S. 41, 46-47, vacated and modified on other grounds, 382 U.S. 159 (1965), and *United States* v. *Miller,* 307 U.S. 174 (1939), upon which petitioners rely (Pet. 21), do not suggest otherwise. In *Maryland,* the only issue was whether, at a time when a National Guard unit had not been called into federal service, a Guard officer who also served as a caretaker of the unit's federally provided equipment was an "employee" of the federal government for purposes of the Federal Tort Claims Act. The Court held that he was not. The Court's reference to the National Guard as the "modern Militia reserved to the States" by the Militia Clause (381 U.S. at 46) did not suggest that members of the Guard could not be ordered to active duty in the national reserve. *Miller,* which held that a statute requiring registration of weapons was not invalid under the Second Amendment, has no relevance to this case.

set forth in the militia clause" (*id.* at 1063). Accord *Drifka* v. *Brainard,* 294 F. Supp. 425 (W.D. Wash. 1968).[8]

3. Petitioners' principal contention is that the Militia Clause reserves to the States all responsibility for the peacetime training of the militia, and thus that the federal government has no authority to order members of the militia to active duty in the national armed forces for that purpose. Pet. 12-20. In petitioners' view, this Court's holding in the *Selective Draft Law Cases* was "strictly limited to, and * * * fundamentally predicated upon, the existence of a national exigency" (Pet. 23; see *id.* at 19-20). This line of argument cannot withstand analysis.

As the lower courts noted (Pet. App. 24a-25a), the language of the Constitution provides no basis for distinguishing—for purposes of their effect on Congress's power under the Armies Clause—between the States' power to train the militia and other limitations on federal authority set forth in the Militia Clause. For instance, under the Militia Clause, the militia as such may be called

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[8] Contrary to petitioners' suggestion (Pet. 25 n.4), *United States* v. *Peel,* 4 M.J. 28, 29 (C.M.A. 1977), *United States* v. *Hudson,* 5 M.J. 413 (C.M.A. 1978), and *United States* v. *Self,* 8 M.J. 519, 521 (A.C.M.R. 1979), aff'd, 13 M.J. 132 (C.M.A. 1982), do not support further review of this case (Pet. 25 n.4). In those cases, the issue was whether accused National Guardsmen had been on active duty in the NGUS at the time when court-martial authorities asserted personal jurisdiction over them. Brief statements in the opinions in those cases suggesting that the States' consent to the Guardsmen's federal service was constitutionally necessary were dicta, since the cases turned on applicable statutes and regulations. Moreover, those dicta predated the passage of the Montgomery Amendment and were unaccompanied by even cursory analysis of the constitutional relationship between the Armies Clause and the Militia Clause. For instance, none of these cases even cite or discuss the *Selective Draft Law Cases.* Any conflict between those dicta and the decision of the lower courts does not warrant this Court's review.

into federal service only to execute the laws, suppress insurrections, and repel invasions. If, as petitioners argue, the Militia Clause prohibits Congress from requiring members of the organized militia to engage in peacetime training in the national armed forces, there is no textual or other basis for finding that Congress has authority to require the same individuals to participate as members of the national armed forces in missions, such as the participation in a war abroad, that are not encompassed by the Militia Clause. Accordingly, the Court's decision in the *Selective Draft Law Cases*—which held that the Militia Clause does not limit Congress's authority to raise and support armies to fight abroad—cannot fairly be distinguished from this case.

Similarly, the Court's holding in the *Selective Draft Law Cases* cannot, as petitioners contend (Pet. 23), be restricted to situations involving "a national exigency." Neither the text of the Constitution nor the language of that decision recognizes a limitation of that nature on Congress's power to raise and support armies. Indeed, it is hard to imagine how such a limitation could be applied or enforced, since there are no apparent standards that would enable any of the Branches to determine when a situation was sufficiently urgent to permit the exercise of Congress's power under the Armies Clause.

Finally, as the lower courts noted, even if there were a basis for limiting petitioners' attack on the dual-enlistment system to peacetime training, petitioner's view would still represent "a rather extraordinary accommodation between the two separate clauses of the Constitution." Pet. App. 39a. Under that view, Congress would have the power to order members of the state militias to active duty in the national armed forces to perform missions other than those permitted by the Militia Clause, but would not have the power to direct their training to perform those missions. Indeed, as the lower courts stressed, petitioners'

position on its face would not even allow federal authorities to direct the training of National Guard units at a time when they had been ordered to active duty in the NGUS for a different purpose. The lower courts properly refused to accept a view which attributes to the Constitution "a meaning so unlikely to have been intended by * * * the framers" (*id.* at 40a).[9]

The flaws inherent in petitioners' position are particularly apparent in the context of our Nation's present defense posture. The NGUS is now an integral part of the front-line defenses of the United States. As of 1986, the Army NGUS provided 46 percent of the Army's combat units and 28 percent of its support forces (C.A. App. 29). In the event of full mobilization, 18 of the Nation's 28 Army divisions would be provided wholly or in part by the Army NGUS. For fiscal year 1987, the Air NGUS provided 73 percent of our Nation's air defense interceptor forces, 52 percent of our tactical air reconnaissance, 34

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[9] This case does not present the question whether Congress could effectively abolish the state militias by inducting all of their members into the national armed forces. Without suggesting that any of these factors are essential to the constitutionality of the Montgomery Amendment, we note that state militias are not limited to the National Guard, but also include "unorganized militias," now all able-bodied men between the ages of 17 and 45 (10 U.S.C. 311); that a State is not required to establish a National Guard (although federal funding provides a powerful incentive to do so (see 32 U.S.C. 106-108)); that a State may establish a separate "defense force" outside the National Guard (32 U.S.C. 109); and that, even under the Montgomery Amendment, governors have authority to withhold consent to the use of National Guard units abroad under Sections 672(b) and 672(d) on grounds other than those foreclosed by that statute (see 132 Cong. Rec. H6237 (daily ed. Aug. 14, 1986) (remarks of Rep. Montgomery)). As the lower courts recognized, the Montgomery Amendment is thus a far cry from an attempt to render the Militia Clause meaningless. Pet. App. 41a-42a.

percent of our tactical airlift, 25 percent of our tactical fighters, 17 percent of aerial refueling, and 24 percent of our tactical air support forces (*ibid.*). It would be incongruous to hold that the Constitution gives Congress the power to establish these reserves as components of the national armed forces, but at the same time withholds authority from federal authorities to conduct their training. Such a view would not only undercut the effectiveness of the national defense, but would also inject the States into matters of foreign policy that the Constitution reserves to the federal government.

4. As the petition reflects (Pet. 25-30), the decision of the lower courts conflicts with a recent decision issued by a divided panel of the Eighth Circuit in *Perpich, supra.* However, the Eighth Circuit has vacated that decision and granted rehearing *en banc.* There is, accordingly, no conflict among the circuits at present with respect to the constitutionality of the Montgomery Amendment and, in our view, no reason for this Court to hear this case. If the Eighth Circuit were to hold in *Perpich* that the Montgomery Amendment is unconstitutional, the Court would then have the opportunity to consider that question upon a petition seeking review of that decision.[10]

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[10] The case was argued to the full court on February 16, 1989. As of the filing of this brief, the Eighth Circuit has not yet issued a decision.

CONCLUSION

The petition for writ of certiorari should be denied.
Respectfully submitted.

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No. 88-1223.

In the
Supreme Court of the United States.

OCTOBER TERM, 1988.

THE COMMONWEALTH OF MASSACHUSETTS,
ET AL., PETITIONERS,

v.

UNITED STATES DEPARTMENT
OF DEFENSE, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioners' Reply Brief in Support of Certiorari.

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PETITIONERS' REPLY BRIEF IN SUPPORT OF CERTIORARI

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1. The respondents do not dispute that the issues raised here are of exceptional importance.

2. This case does not involve generalized "order[s] for active duty," as respondents' Question Presented would have it. If the orders had been for such active duty, without more, no case would ever have been brought.

Rather, the orders generating this case were for training, and the case arises under the Militia Training Clause of Art. I, § 8, cl. 16 of the Constitution.

The decision below is unprecedented in effectively nullifying the Militia Training Clause. There is no other case that construes the general language of the Armies Clause to override the clear terms of the Militia Training Clause, which expressly withholds the militia training power that the respondents assert.

Respondents' suggestion that the Selective Draft Law Cases, 245 U.S. 366 (1918) (validity of the draft for purposes of fighting World War I) and Cox v. Wood, 247 U.S. 3 (1918) (same) have already decided the question presented here in their favor is completely without merit. Neither case involved training. In fact, the only references to the Militia Training Clause in the Selective Draft Law Cases affirm the states' authority for "carrying out" the training of the militia. Id., 245 U.S. at 383, 387, quoted in Petition for Certiorari, p. 22.

Likewise, the lower court decisions cited by the respondents[1/] involved combat, not training. None construed the Militia Training Clause.

1/ Johnson v. Powell, 414 F.2d 1060 (5th Cir. 1969); Drifka v. Brainard, 294 F. Supp. 425 (W. D. Wash. 1968).

The respondents' contentions, if fairly stated, would be that the Court should extend -- but has not extended -- these cases to the training context and should allow Congress, rather than the States, to exercise "the Authority of training the Militia," thereby nullifying the Militia Training Clause. These are merely arguments on the merits.

3. Important constitutional issues of first impression will remain unresolved by this Court, unless certiorari is granted. No matter which way the Eighth Circuit en banc rules in Perpich v. United States Department of Defense, Eighth Circuit No. 87-5345, the Eighth Circuit panel's thorough majority opinion upholding the Commonwealth's position demonstrates that the power

asserted by the respondents here is highly controversial and doubtful.

The petitioners respectfully suggest that certiorari should be granted for the additional reasons stated in this reply brief.

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